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August 19, 2005

WA Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

RE: NPDES Phase II Stormwater Permit – First Preliminary Draft Comments

Attached is a copy of a letter sent to Ecology from the Association of Washington Cities and Washington State Association of Counties regarding the NPDES Phase II Stormwater Permit. The City of Vancouver supports and concurs with the comments and concerns addressed in this letter.

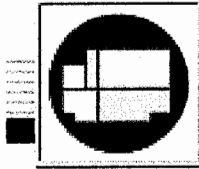
Vancouver appreciates the substantial and substantive work done by the Department of Ecology. Vancouver is seeking to obtain a permit which provides coverage and legal certainty by quickest means possible. However, there are statements within the draft permit which bring into question the legal certainty provided and raise concerns. Specifically, under section "S7. Stormwater Management Program" item 1.b. states that "each permittee shall develop and implement a public education and outreach program designed to reach 100% of the target audiences". This requirement for 100% design is unobtainable. Certainly all efforts are made in any public outreach and education program to reach as many as possible, but it is unrealistic to include such statements and hold the permittees to such a standard. Use of language such as "all" or 100% should be eliminated within the permit requirement. The suggestion would be to change the language to "majority of the target audience".

Thank you for your consideration and we look forward to the next discussions and the final draft permit for review.

Sincerely,

Annette Griffy, P.E.
Senior Civil Engineer
Surface Water Management

CC: Victor Ehrlich, P.E. City Engineer
Brian Carlson, P.E. Public Works Director



Washington State Association of Counties

Mr. Jay Manning, Director
Washington State Department of Ecology (DOE)
P.O. Box 47600
Olympia, WA 98504-7600

RE: NPDES Phase II Stormwater Permit – Concerns with draft permit and rule, and request for meeting in advance of Aug. 19 to discuss options and alternatives

Dear Mr. Manning:

We write on behalf of the cities and counties in our Associations required to adopt Phase II NPDES permits under the Federal Clean Water Act. We appreciate the considerable work the Department of Ecology has put into the draft requirements for NPDES Phase II permits. However, there are numerous concerns, so we are asking that you and appropriate Ecology staff meet with a group of us in advance of the August 19 comment deadline to explore options and alternatives to some items in the current preliminary draft.

First, let us underscore that Phase II cities and counties feel strongly about having a Phase II permit that offers them coverage and legal certainty regarding stormwater, and gives them guidance to help meet environmental stewardship responsibilities. We want to see the permit finalized – sooner rather than later. At the same time, Phase II jurisdictions do not believe the permit is workable in its current form, and believe it is critical that we develop mutually acceptable options. Without delving into minutiae, here are our major concerns:

Monitoring: The draft permit proposes to require the 85 Western Washington Phase II jurisdictions develop comprehensive stormwater monitoring plans, and do so in a way that demonstrates the Ecology manual, BMPs, and approaches to stormwater discharges will result in improvements to water quality and overall environment. The cost implications of this requirement are enormous, and the expectation of what is to be achieved is simply beyond what we consider reasonable. There are simply too many variables and factors that affect environmental conditions – involving non-point sources and other things beyond our control -- for us to specifically measure how stormwater programs and BMPs are improving water quality. We would like to present an alternative monitoring plan that is more achievable, with programmatic and adaptive management features that can be more easily measured.

Pre-development, forested conditions – and legal ‘takings’ concerns: Language in the permit as drafted requires that stormwater flows be mitigated to meet a standard of pre-development, forested conditions. We believe that in urban and urbanizing environments, this standard is unattainable and raises serious legal concerns. We have consulted with City Attorneys and County Prosecuting Attorneys who strongly believe that mitigation requirements outlined in the draft permit would leave jurisdictions very vulnerable to “takings” claims. Specifically, attorneys have cited the *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General’s

Office that reads in part, "...a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated."

"New discharge" definition: Language in the permit seems to imply that *any* change to an existing outfall – even replacing a culvert to comply with Washington Department of Fish and Wildlife guidelines – is to be defined as a "new discharge." Additionally, the permit requires application of the DOE Manual or equivalent. This would require changes to plans in the review process. This would appear to fly in the face of vesting laws, and would place major burdens on our jurisdictions. We would like to discuss language modifications to clarify that replacement of failing or inadequate outfalls does not qualify as a 'new' stormwater discharge and that recognizes state vesting laws.

Deadlines that are unattainable: The Phase II permit as drafted contains a wide array of adoption deadlines and inspection frequencies, many of them within one year. These will be difficult to impossible to achieve, particularly for the smaller Phase II jurisdictions that do not yet have a formal stormwater program.

Testing and reporting requirements: If DOE wants all existing BMPs subjected to testing, we believe the Department should bear the cost and responsibility for that testing, not counties and cities. We also are concerned that the reporting requirements in the draft permit will be too burdensome – particularly for smaller jurisdictions – and that annual reporting of things such as expenditures is a subjective measurement that doesn't improve the environment or stormwater programs in general. We would like to explore other options for frequency and content of reporting requirements.

Assumptions regarding adoption of the DOE stormwater manual: The Phase II draft makes the tacit assumption that jurisdictions should adopt the DOE stormwater manual as Best Available Science (BAS). The manual – which was intended to be used for guidance only and not as a requirement – contains a number of conditions that are of serious concern to jurisdictions. For example, it classifies replacement and maintenance actions of already-impervious surfaces, including roads, as redevelopment. In addition, there is concern that the option to adopt an equivalent manual that recognizes municipality-specific conditions is not provided in Phase II as it is in Phase I.

Fiscal, liability, and staffing concerns: We are concerned that Phase II jurisdictions will be paying new permit fees, and yet Ecology will not have staffing in place to properly review the Phase II programs that will be submitted. This leaves cities and counties wondering what we are paying for, and whether there will be the "coverage" that we saw as a central reason to go forward with a Phase II permit requirement in the first place. If standards are too high, and administrative review and protection is haphazard, *our* liability exposure is actually *increased*, rather than *reduced*, as was intended.

Overall, the Draft Phase II permit appears to go well beyond the six mandatory minimum EPA guidelines "+ 2" agreement that local jurisdictions and DOE agreed to through the advisory committee process in late 2003. It also goes beyond what has been adopted in many other states which do not require any monitoring element (other than evaluation of program

compliance) for Phase II jurisdictions. As such, we are very concerned about costs, unfunded mandates, practicability, and legal 'takings' issues.

Therefore, we ask for time with you and senior staff in advance of August 19 to meet and begin the work of exploring mutually acceptable alternatives. We will be in touch with your office soon to schedule the meeting. Once again, we would like to express our appreciation for Ecology's work to date on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Williams", with a stylized flourish at the end.

Dave Williams
Staff Associate
Association of Washington Cities

Paul Parker
Assistant Executive Director
Washington State Association of Counties

cc: Bill Moore, Department of Ecology